IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

MISC. PETITION NO. 19 OF 2002

SICOM LIMITED .. Petitioner.

vs.

Padmashri Mahipatrai
J. Shah & Ors. .. Respondents.

Mr. K. Setalwad with M.P. Rege for petitioner.
Mr. S. Jain i/by A.V. Jain for R. Nos. 1 to 3.

CORAM : S.U.KAMDAR, J.
DATE : 5th April, 2005.

P.C.

The present petition is filed for recovery of a sum of Rs. 1,52,96,626.97 under section 31 (1) (aa) of the State Financial Corporation Act. The claim made against the respondent is based on an indemnity cum guarantee dated 9.2.1993.

2. Some of the material facts in the present case, briefly enumerated, are as under :-

3. The petitioner as the State Financial Corporation and the petitioner disbursed to the respondent no. 4, a limited company, a financial

assistance in the sum of Rs. 60 lacs by way of subscription to its equity share capital. The respondent no. 1 to 3 have given their personal/ individual guarantee for repayment of the aforesaid amount of loan of Rs. 60 lacs by way of repurchase of the said shares. It is the case of the petitioner that sometime in or about November 1992 or thereabout the respondent requested for the said financial assistance of Rs. 60 lacs towards 6 lacs equity shares of Rs. 10/- each and subscription agreement dated 9.2.1993 has been executed in that behalf. Pursuant to the said agreement executed the petitioner has paid the said amount to respondent no. 4 company and the respondent nos. 1 to 3 have executed an agreement dated 9.2.1993. Some of the material clauses of the said agreement which are relevant for the purpose of the present petition are as under :

> "1. In consideration of the Corporation subscribing to the said shares in the company’s share capital, the Guarantors hereby agrees that if the Guarantors fails to purchase the said shares from the Corporation at a price mentioned hereinafter and take delivery of the relative share certificate or fail to communicate their acceptance or refusal within a period of 30 days from the demand made by the Corporation

and to pay / reimburse to the Corporation all the expenses including the share transfer fees, stamp duties and other expenses of and incidental thereto, the Corporation shall be free to transfer or sell the said shares to any other party at any time at such price and on such terms and conditions as it may deem fit without making any further reference / offer to the Company and / or the Guarantors and the Guarantor shall indemnify and keep indemnified the Corporation against any loss including share transfer fees, stamp duties and all other expenses arising out of such sale of transfer of the said shares to any party / parties and the Guarantors will identify and pay tot he Corporation at Bombay on demand the said amount of loss including the share transfer fees, stamp duties and all other expenses as aforesaid together with interest thereon at the current lending rate of the Corporation at that point of time whichever is higher, from the date of sale/transfer till payment.

2. The loss that the Corporation shall suffer by sale of the shares to any party/ parties will be ascertained by deducting the new amount that may be realised by the

Corporation by sale / transfer of the said shares from the agreed purchase price of the said shares so sold as per clause 3 hereinafter mentioned.

3. The Guarantor agree to purchase the said shares at all price being the highest of the following

(i) The paid up value of the shares plus an amount computed at the prevailing lending rate of the Corporation for non-refinanceable loans at the time of sale less dividend, if any, received by the Corporation in respect of the said shares from the date of such subscription or deposit / advance against the same upto the date of sale. PROVIDED HOWEVER, such price shall not be less than the paid-up value of the said shares.

(ii) The average price of the shares of the Company ruling on the recognised stock exchanges / OTCEI computed for a period of three months from the date on which the option for the repurchase of shares is to be

exercised by the Guarantors.

(iii) The break-up value of the shares of the Company on the basis of proforma and/or audited accounts, if available, for the quarter ended within atleast 120 days from the date of offer by the Corporation for the same of the shares.

4(a) Out of the sale proceeds of the said shares all the costs, charges and expenses that may be incurred by the Corporation in the sale / transfer of the said shares will be deducted in the first instance and thereafter the balance amount will be taken into consideration as net sale proceeds for ascertaining loss, if any, in the price of the said shares to be arrived at in accordance with the provisions of clause 2 and 3 above.

(b) If the net sale proceeds are insufficient to cover the price of the said shares, as arrived at under clause 3 above or in case the Corporation is not able to

sell/transfer the said shares within a period of six months from the date of intimation of sale of the said shares to the Guarantor, the Guarantor agrees to pay to the Corporation the said loss or the price determined as per clause 2 and 3 hereinabove as the case may be within the period of 30 days from the date of demand by the Corporation with interest thereon at the rate of 24.5% per annum.

6. The Guarantors further declares that this idemnity/guarantee shall not in any manner be effected by reason of any laches on the part of the Corporation to sell the said shares.

It is the case of the petitioner that the respondent no. 4 failed and neglected to repay the amount lent and advanced to them under the said arrangement and as per clause (1) of the agreement respondent no. 1 to 3 were required to repurchase the entire shareholding of the petitioner of 6 lacs equity shares at the expiry of three years from the commencement of commercial production. It is also an admitted position that the commercial production has commenced some time on or

about 1.10.1994 and accordingly, the company was required to repurchase the shares on 1.11.1997. In view of the default on the part of the company in repaying the shares the petitioner company by notice dated 29.9.1997 called upon the respondent nos. 1 to 3 to purchase the said shares on 1.11.1997 which was expiry of three years period prescribed under the said agreement. The respondent company having failed to repurchase the said shares, the petitioner was entitled to sell the said shares and adjust the sale proceeds and claim balance amount. Further, it is an admitted position that the petitioner never sold the said shares in the market and according to the petitioner they were unable to sale the said shares because the trading in the respondent company's shares was suspended with effect from 7.9.1998. In the aforesaid circumstances, the present petition has been filed by the petitioner for recovery of the entire amount i.e. sum of Rs. 60 lacs plus interest accrued thereon totalling to Rs. 1,52,96,626.97.

4. Apart from various other contentions which ar raised by the respondent company, the respondent company has contended that the claim made by the petitioner is ex facie barred by law of limitation. The notice of invocation of the guarantee is dated 28.9.1997 stipulating therein performance of the contract of repurchase of the shares as 1.11.1997. Under clause 4 (b) of the said agreement it is provided that if the

company is not able to sale or purchase the said shares within a period of six months from the date of intimation of the sale of the said shares to the guarantors then the guarantors agree to pay to the Corporation the said loss or price determined as per clause 2 and 3 hereinabove as the case may be within a period of 30 days from the date of the demand. The period of six moths as contemplated under clause 4 (b) expired on 1.5.1998 i.e. from 1.11.1997 when the date was specified for performance of the said contract. Thus, as on 1.5.2001, the petition is barred by law of limitation. However, the petition is filed in this Court on 4.12.2001. It has been contended by the learned counsel for the petitioner that the said claim is within time because the later portion of clause 4 (b) provide for 30 days from the date of demand. It has been contended by the learned counsel for the petitioner that the said date of demand must be taken as the date on which the notice is issued i.e. subsequent notice on 15.9.1999 and if the said date is taken into consideration then in that event the said claim is within time. I am unable to accept the contention advanced by the learned counsel for the petitioner. The date of demand contemplated under clause 4 (b) is the date on which the Bank guarantee is invoked i.e. 29.9.1997. The calculation which is required to be carried out within the period of six months does not contemplate the fresh demand to be made by the petitioner on the respondent for the purpose of recovery

of the said amount. In that view of the matter, the present petition is barred by limitation. The same is thus required to be dismissed. The petition is accordingly dismissed. However, there shall be no order as to costs.